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JOSEPH F. SPANIOL, JR.
CLERKIN THE
Supreme Court of the United States

OCTOBER TERM, 1986

KENNETH WALTON and JEAN WALTON,
Petitioners,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
*Respondent.*On Petition for Writ of Certiorari
To the Appellate Department of the
San Diego County Superior Court in
the State of California

BRIEF OF RESPONDENT IN OPPOSITION

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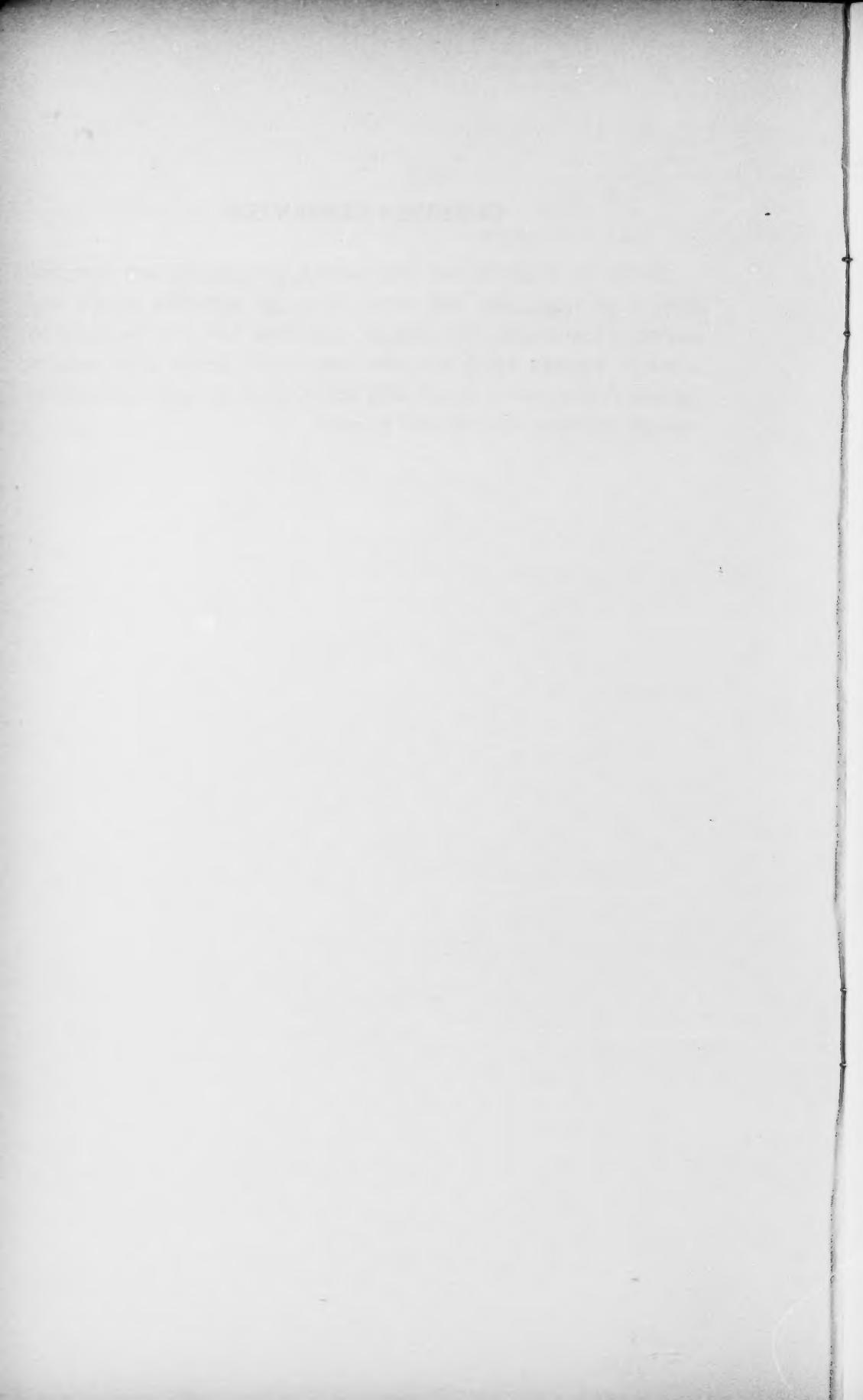
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QUESTION PRESENTED

In an investigation into production, possession, and distribution of photographic and video materials depicting people engaging in sexual acts with animals, may films be seized pursuant to a search warrant which describes items to be seized as those containing depictions of specifically described oral, anal, and genital sex acts between animals and people?



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OPINIONS BELOW

In an unreported decision, the Appellate Department of the San Diego County Superior Court unanimously affirmed the decision of the Municipal Court of the North County Judicial District of San Diego County denying petitioners' pretrial motion for return of property seized pursuant to search warrant. The California Court of Appeal, Fourth District, Division One, and the California Supreme Court declined to review the case.

JURISDICTION

This Court has jurisdiction to consider this case pursuant to 28 United States Code section 1257, subdivision 3.

STATUTES INVOLVED

The provisions of the First and Fourth Amendments to the United States Constitution are adequately set forth in the Petition for Writ of Certiorari, page 2.

The text of California Penal Code section 311.2(a) is set forth in Appendix A, *infra*.

STATEMENT OF THE CASE

In a complaint filed in the Municipal Court, North County Judicial District of San Diego County, Kenneth Walton and Jean Walton, petitioners, were charged with offering to distribute, distributing, and exhibiting to others obscene matter, a misdemeanor. (Cal. Pen. Code, § 311.2(a); appendix A.)

On June 20, 1986, petitioners' pretrial motion for return of property was denied in the Municipal Court of the North County Judicial District in San Diego County, State of California.¹

On January 29, 1987, the judgment of the Municipal Court was unanimously affirmed by the Appellate Department of the San Diego County Superior Court.

On March 2, 1987, the Appellate Department of the San Diego County Superior Court denied petitioners' Petition for Re-hearing and Application for Certification to the Court of Appeal.

On March 11, 1987, the California Court of Appeal, Fourth Appellate District, Division One, denied petitioners' Petition for Writ of Mandate or Prohibition and Request for Stay.

On March 23, 1987, the California Supreme Court denied petitioners' Application for Stay and Petition for Review.

On March 31, 1987, in the Municipal Court of the North County Judicial District of San Diego County, petitioners pleaded guilty to

¹ The text of the rulings from the lower courts is adequately set forth in the Petition for Writ of Certiorari, appendices A-1 through A-7.

one count of California Penal Code section 311.2 (possession of obscene matter with intent to exhibit to another), a misdemeanor.

STATEMENT OF FACTS

On May 1, 1986, San Diego County Deputy Sheriff Robert M. Hoxter applied for a search warrant (appendix B) to search petitioners' home for evidence of their involvement in possession, production, and distribution of materials involving sex with animals. The affidavit supporting the application for the warrant indicated Hoxter's experience as an investigator, his knowledge of sex with animals pornography production and, specifically, the following information which was the result of a combined agency investigation into animal pornography.

Deputy Hoxter had received information from Bruce Ackerman, an investigator for the Wallowa County District Attorney's Office, Wallowa, Oregon, that during his investigation involving a Michigan pornographer, Ackerman discovered that petitioners appeared to be involved in the production and trading of films involving sex with animals.

In the search warrant affidavit, Officer Hoxter provided, among other information, the following information gleaned from Investigator Ackerman:

1. Ackerman had been given the names and address of the petitioners by a known pornography distributor in Michigan.
2. Ackerman had spoken over the phone with a man identifying himself as Kenny Walton (petitioner) who told Ackerman that:
 - a) Ken Walton had had oral sex with stallions (describing the taste and feel of the horse's sex organ).
 - b) Walton's wife had sex with stallions (though could not get the full length of the horse's penis in her).
 - c) Walton's wife had had sex with several Arabian stallions.
 - d) Walton owned a male dog and that both he and his wife have had sex with the dog.

- e) Walton said he had a video tape of his wife having sex with a stallion.
- f) Walton had many other tapes of animal sex.
- g) Walton's address was 1039 Hoover Street, Escondido, California.

3. Ackerman had spoken over the phone with a woman identifying herself as Jean Walton (petitioner) who told him:

- a) She had had sex with about four stallions.
- b) She could insert about half of a 20-inch horse penis inside her vagina.
- c) She likes having oral sex with stallions.
- d) She and her husband had had sex with the dog.
- e) They have a video tape of her having sex with the dog.
- f) They have two portable video tape machines.
- g) They would bring their tapes of animal sex to Oregon (Ackerman's alleged ranch) to copy and trade with Ackerman.

In addition to the information from Ackerman, Hoxter informed the magistrate that based on his training and experience, people involved in sex with animals and films of the same usually keep such films at home, along with correspondence information on those people they communicate and trade with.

In his affidavit supporting the warrant, Hoxter included copies of the written correspondence between Ackerman and petitioners which focused entirely on sex with animals.

Based on the above, a search warrant was issued for petitioners' home, to search for and seize papers and correspondence bearing petitioners' names, exposed but undeveloped film, dominion and control items, and photographs, negatives, slides, video cassettes or any other photographic or video recording medium depicting suspects in acts of sexual assault on animals, specifically human-genital to animal-genital contact, human-oral to animal-genital contact, animal-oral to human-genital contact, human-genital to animal-

anal contact, animal-genital to human-anal contact, human-oral to animal-anal contact.²

The search was conducted on May 2, 1986, by Deputy Sheriff Hoxter and several other officers.

During the search, the officers discovered over 60 video tapes, many with labels indicating titles such as "Animal Love #3," "Barnyard Ball," "Pony and Jean Walton...Jean Walton and Sausage," "Jean Walton and Pony...," "Pony with Jean Walton," etc.

Deputy Hoxter instructed another officer at the scene to review the titles of the tapes to determine if the content of the tapes involved bestiality. At that moment, petitioner Kenneth Walton, who was standing nearby, made the unsolicited statement, "You'll want to take all of them!", while waving his arm in the direction of a tape cabinet.

The officers then seized at least 60 video tapes that, according to petitioner's unsolicited statement, were about sex with animals. Rather than moving in with petitioners for several days while they viewed the seized tapes, the officers took all the tapes and viewed

² In their Petition for Writ of Certiorari, petitioners completely omitted the particular and detailed description contained in section "B" of the warrant, which confined the officers to seizing materials that contained depictions of the above-described multiple variations of sexual activity between humans and animals. Likewise, petitioners excised from their representation of section "C" of the warrant another particular description of items to be seized which specified "...depicting the suspect/suspects, in an act of sexual assault upon an animal protected by Penal Code section 597f, as described in Penal Code section 286.5," Nor did petitioners append a recitation of the complete provisions of the warrant. In light of petitioners' claim that the warrant failed to specifically identify individual items to be seized (Petition for Writ of Certiorari, "Question Presented," p. i), petitioners' omission of the specific descriptions contained in the warrant makes petitioners' incomplete description of the provisions of the warrant (Petition for Writ of Certiorari, pp. 4-5) a questionable representation to the Supreme Court of the United States.

them at the police department. Tapes not containing sex with animals were later returned to petitioners.³

REASONS FOR DENYING THE WRIT

Certiorari should be denied because the Appellate Department of the San Diego Superior Court fully considered and correctly decided the issue at bar, relying on prior decisions of this court, including *New York v. P. J. Video, Inc.* (1986) 475 U.S. ___, which are controlling. Moreover, the Federal Circuit Court decisions that petitioners allege are in conflict differ only on facts, and are in fact consistent in application of the concepts set forth in previous, controlling decisions of this Court.

ARGUMENT

I

PRIOR DECISIONS OF THIS COURT ARE CONTROLLING.

This Court has promulgated and consistently applied three main principles in analyzing searches and seizure of obscene materials.

First, no seizure of presumptively protected expression may occur without a warrant. (*Roaden v. Kentucky* (1973) 413 U.S. 496, 504.)

Second, a warrant authorizing the seizure of materials presumptively protected by the First Amendment may not issue based solely on the conclusory allegations of a police officer that the sought-after materials are obscene, but instead must be supported by affidavits setting forth specific facts in order that the issuing magistrate may

³ Many of the tapes returned consisted of subject matter including sexual bondage, "punishment," body part piercing, urination in people's mouths, and sex with vegetables. Although many may have been arguably obscene, they were nonetheless returned (along with the sex trapeze and latex horse penis) in light of the fact they had not been anticipated or described in the search warrant.

focus searchingly on the question of obscenity. (*New York v. P. J. Video, Inc., supra*, 475 U.S.____ citing *Marcus v. Search Warrant* (1961) 367 U.S. 717, 732.)

Third, the warrant issued must particularly describe the things to be seized. (*Roaden v. Kentucky, supra*. 413 U.S. 496, 504 quoting *Stanford v. Texas* (1965) 379 U.S. 476, 485.)

These three requirements were met in the case at bar. The officers applied for a warrant to seize the films. The affidavit contained detailed descriptions (provided by petitioners to Ackerman) of the human-animal sex acts depicted on video tapes sought to be seized. The warrant particularly described the specific human-animal sex depictions to be seized.

II

FEDERAL CIRCUIT COURT DECISIONS ARE NOT IN CONFLICT, AND APPLY PRINCIPLES FROM THE CONTROLLING DECISIONS OF THIS COURT.

While decisions in the Federal Circuit Courts may differ in their conclusions regarding the validity of specific seizures based on the facts in individual cases, they do not conflict in their application of the three fundamental obscenity seizure principles above.

See, for example, *United States v. Guarino* (1st Cir. 1984) 729 F.2d 864, 865 (warrant invalid that failed to particularly describe items to be seized when only description provided was "a quantity of obscene materials"). See also *Sequoia Books, Inc. v. McDonald* (7th Cir. 1984) 725 F.2d 1091, 1093 (warrant upheld that authorized seizure of materials containing depictions of "cunnilingus, fellatio, anal intercourse, excretion of semen from penis onto other person," etc.). See *Matter of Property, Etc.* (9th Cir. 1981) 644 F.2d 1317, 1319 (warrant upheld which commanded officers to seize "those books, magazines, and films" which depicted specific sex acts described in an attached affidavit as scenes of seven and eight year-olds engaged in nude gay and straight sexual activity, scenes of sexual intercourse, fellatio, cunnilingus, group sex, golden showers, bisexual sex, [etc.]).

CONCLUSION

Petitioners' Petition for Writ of Certiorari should be denied as their argument is without merit, and because the issue was considered and correctly decided by the lower court based on prior decisions of this Court, which are controlling and have been consistently applied in Federal Circuit Court decisions.

Dated: July 6, 1987

Respectfully submitted,

EDWIN L. MILLER, JR.

District Attorney

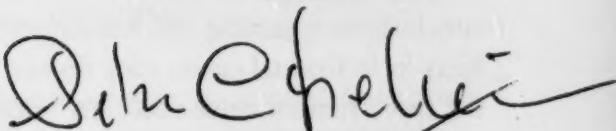
PETER C. LEHMAN

Deputy District Attorney

DAVID A. WILLIAMS

Deputy District Attorney

Signed:

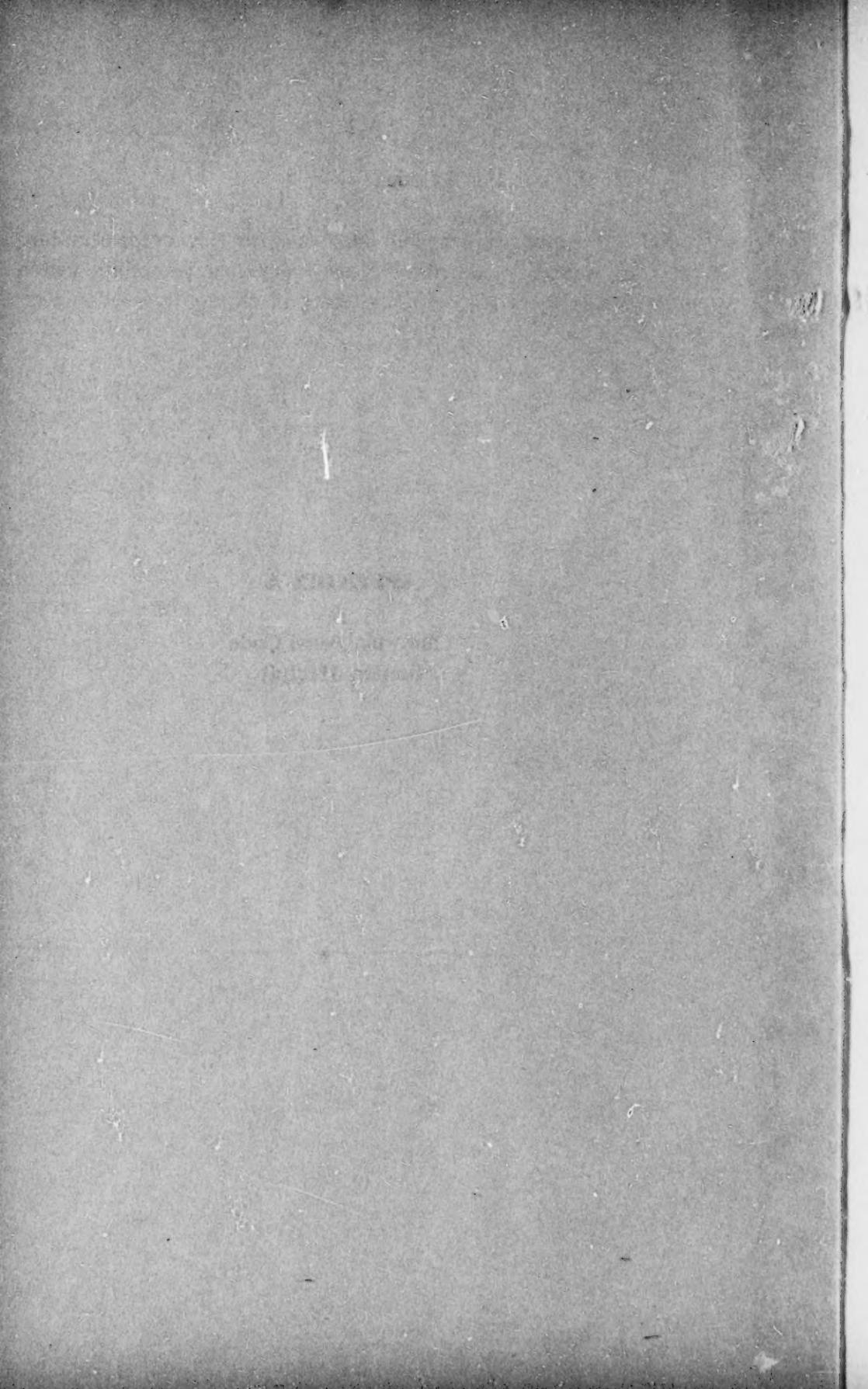


PETER C. LEHMAN

Deputy District Attorney

Attorneys for Respondent

APPENDICES



"California Penal Code:

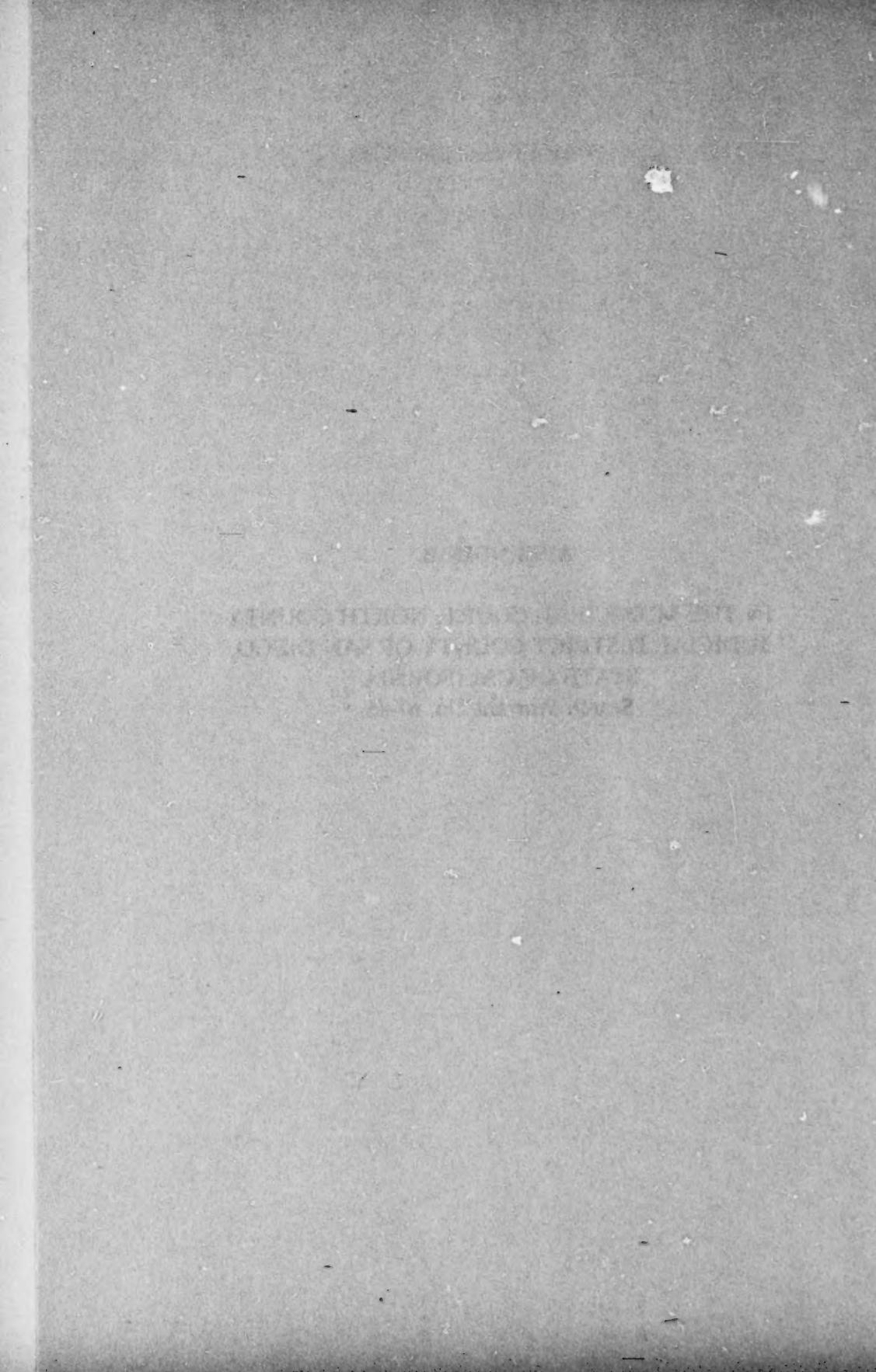
§ 311.2. Sending or bringing into state for sale or distribution; printing, exhibiting, distributing, exchanging or possessing within state; matter depicting sexual conduct by minor; transaction with minor; exemptions

"(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is for a first offense, guilty or a misdemeanor. If the person has previously been convicted of any violation of this section, the court may, in addition to the punishment authorized to Section 311.9, impose a fine not exceeding fifty thousand dollars (\$50,000)."



APPENDIX B

IN THE MUNICIPAL COURT, NORTH COUNTY
JUDICIAL DISTRICT COUNTY OF SAN DIEGO,
STATE OF CALIFORNIA
Search Warrant No. 67-86



IN THE MUNICIPAL COURT, NORTH COUNTY
JUDICIAL DISTRICT COUNTY OF SAN DIEGO,
STATE OF CALIFORNIA

SEARCH WARRANT
NO. 67-86

The People of the State of California, to any sheriff, constable, marshal, policeman, or any other peace officer in the County of San Diego:

Proof, by affidavit, having been this day made before me by ROBERT M. HOXTER, a peace officer and a detective employed by the San Diego County Sheriff's Department, that there is substantial probable cause for the issuance of the search warrant, you are, therefore, commanded to make search at any time of the day, good cause being shown therefor, of the premises located at and described as follows:

The premises to be searched is located at 1039——Hoover [H.E.] St., Escondido, California, which is a single story residence constructed of light brown (chamois) wood siding and dark brown wood trim. The premises front door faces east and the front yard is fenced in wrought iron with brown brick corner pillars. The premises to be searched has a brown asphalt shingle roof and the numerals 1039 are embedded in the south/east corner pillar at the north edge of the driveway. The designated premises includes all rooms, attics, garages, storage areas, closets and containers and detached outbuildings at and assigned to said premises.

You are commanded to search for the property described as follows:

- A. Papers, letters, envelopes, forms, lists, records, journals, address books, and writings, as that term is defined in the California Evidence Code, bearing the name **KENNETH W. WALTON** and/or **JEAN A. WALTON**, or any variation thereof.
- B. Photographs, negatives, slides, video cassettes, or any other photographic or video recording medium depicting the suspect/suspects, in an act of sexual assault upon an animal protected by Penal Code Section 597f, as described in Penal Code Section 286.5, for the purpose of arousing or gratifying the sexual desire of the person, to wit: human/genital to animal/genital contact, human/oral to animal/genital contact, animal/oral to human/genital contact, human/genital to animal/anal contact, animal/genital to human/anal contact, human/oral to animal/anal contact.
- C. Photographs, negatives, slides, video cassettes, or any other photographic or video recording medium depicting the suspect /suspects, in an act of sexual assault upon an animal protected by Penal Code Section 597f, as described in Penal Code Section 286.5, possessed or possessed with the intent to distribute or exhibit toothers, any obscene matter.
- D. Exposed but undeveloped rolls of film.
- E. Papers, letters, forms, envelopes, lists, records, journals, address books and writings as that term is defined in the California Penal Code, bearing the name **KENNETH N. WALTON** and/or **JEAN A. WALTON**.
- F. Papers, letters, forms, envelopes, lists, and records, journals, address books and writings as that term is

defined in the California Penal Code, bearing the names or addresses of persons and indicating a sexual interest in the sexual assault of animals, as described in Penal Code Section 286.5.

G. Documents and effects tending to show dominion and control over said premises with the contents thereof including rental agreements, rent receipts, keys and photographs which depict persons and any portions of the residence at 1039 —— Hoover [H.E.] St., Escondido, California, and federal tax forms.

3. I believe there is substantial probable cause to search the described premises for the following items of personal property and evidence, within the meaning of penal code section 1524, which are sometimes referred to hereafter collectively as "the property" or "the described property".

If you find the described property, or any part thereof, you are commanded pursuant to Penal Code section 1536 to retain it in your custody pending further order of this court or any court hearing proceedings in which the seized property is evidence.

Given under my hand and dated this 1st day of May, 1986.

[Original signed: Harley Earwicker]

JUDGE OF THE MUNICIPAL COURT

CERTIFICATE OF SERVICE BY MAIL

KENNETH WALTON and JEAN WALTON,)
Petitioners,)
)

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,)
)Respondent.)
)

State of California)
)
City and County of San Diego)
)
ss.

PETER C. LEHMAN, a member of the Bar of the Supreme Court of the United States, being duly sworn, deposes and states:

That his business address is 101 West Broadway in the City and County of San Diego, State of California. Since he will be out of the country when the printing of the brief is accomplished, that on July 7, 1987, he instructed his secretary to mail true copies as soon as prepared of the attached Brief of Respondent in Opposition in the above-entitled matter to counsel of record by placing same in envelopes addressed as follows:

Supreme Court of California
455 Golden Gate Avenue
San Francisco, CA 94102

Clerk of the Superior Court
Appellate Department
220 West Broadway
San Diego, CA 92101

Municipal Court of San Diego
Judicial District, North County
325 S. Melrose Drive
Vista, CA 92083

Clerk of the Court
California Court of Appeal
Fourth Appellate District
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San Diego, CA 92101

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110 West A Street, S. 700
San Diego, CA 92101

Thomas F. Homann, Esq.
432 F Street, Suite 204
San Diego, CA 92101

Subscribed and sworn to before
me this 7th day of July, 1987

Peter C. Lehman
NOTARY PUBLIC IN AND FOR THE CITY
AND COUNTY OF SAN DIEGO, CALIFORNIA

Said envelopes were sealed and deposited in the United States Mail on July 20, 1987, at San Diego, California, with First class postage thereon fully prepaid.

Subscribed and sworn to before
me this 25 day of July, 1987

Signed Thomas J. McNamee
Secretary

Thomas J. McNamee
NOTARY PUBLIC IN AND FOR THE CITY
AND COUNTY OF SAN DIEGO, CALIFORNIA



PETER C. LEHMAN
Deputy District Attorney

